82-2056

No. ....

IN THE

Supreme Court of the United States

October Term, 1982

ESCONDIDO MUTUAL WATER COMPANY, CITY OF ESCONDIDO and VISTA IRRIGATION DISTRICT,

Petitioners,

vs.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA and PALA BANDS OF MISSION INDIANS, and THE SECRETARY OF INTERIOR in his capacity as trustee for said Bands,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Questions Presented for Review

Petitioners, who were jointly granted a license to operate Federal Power Project No. 176 by the Commission, respectfully seek review of the following issues which are the basis of the Ninth Circuit reversal:

1. Does the Act of January 12, 1891, 26 Stat. 712, permit the Mission Indian Bands to veto the Commission's decision to relicense a federal power project by withholding consent to the continued used of reservation lands?

2. Does section 4(e) of the Federal Power Act permit the Secretary of Interior to veto the Commission's decision to relicense a federal power project by imposing unreasonable conditions on the continued use of reservation lands?

3. Are Indian "water rights" a "reservation" within the meaning of section 4(e) of the Federal Power Act?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Escondido Mutual Water Company (Mutual), City of Escondido (City) and Vista Irrigation District (Vista),[1] respectfully pray that a Writ of Certiorari issue to review the opinion of the Court of Appeals for the Ninth Circuit entered November 2, 1982, as modified on denial of rehearing on March 17, 1983.

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[1]Other Parties to the proceedings below included: The La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians (Bands); the Secretary of Interior in his capacity as trustee for the Bands (Interior); and the Federal Energy Regulatory Commission (Commission).

Several other parties were represented before the Commission but took no part before the Ninth Circuit: San Diego Gas & Electric Company; California Department of Fish and Game; and Ulhlein Hansen.

Opinions Below

The Opinion of the Ninth Circuit is reported at 692 F.2d 1223, (Appendix (App.) 1-30). The Order denying rehearing with Anderson J. concurring and dissenting is reported at 701 F.2d 826 (App. 31-41). Commission Opinion and Order No. 36 is reported at 6 FERC ¶61,189, 20 F.P.S. 5-614 (App. 42-309). Commission Opinion and Order No. 36-A on rehearing is reported at 9 FERC ¶61,241, 19 F.P.S. 5-659 (App. 310-378). The Initial Decision of the Administrative Law Judge (ALJ) is reported at 6 FERC ¶63,008 (not included in Appendix).

Statement of Jurisdiction

The Court has jurisdiction of this petition pursuant to 28 U.S.C. §1254(1). Jurisdiction in the Court below was based on FPA §313(b), 16 U.S.C. §825*l*(b).

The judgment sought to be reviewed, *Escondido Mutual Water Co. v. Federal Energy Regulatory Commission* (1982 9th Cir.) 692 F.2d 1223, was filed on November 2, 1982. The Order denying rehearing, *Escondido Mutual Water Co. v. Federal Energy Commission* (1983 9th Cir.) 701 F.2d 826, was filed on March 17, 1983.

On March 31, 1983, Petitioners' Motion for a Stay of Mandate was granted until June 15, 1983, and upon filing this petition, until disposition by this Court.[2]

Statutes Involved

The major statutes involved are Section 8 of the Mission Indian Relief Act (MIRA), Act of June 12, 1891, 26 Stat. 712. (App. 379-80) and various provisions of the Federal Power Act (FPA), Act of June 10, 1920, 41 Stat. 1063, as amended (16 U.S.C. §791a, et seq.) including §§3(2), 4(e), 10(a), 10(e), 10(i), 14, 15(a), 15(b), 27 and 29 (App. 380-388).

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[2]On June 6, 1983, the Court granted the Commission an extension of time until July 15, 1983, in which to file a petition for a writ of certiorari.

Statement of the Case

The Commission[3] first licensed Project No. 176 to Mutual in June, 1924 for a fifty-year term. Project 176 includes the Escondido Canal, originally constructed in 1895, which conveys water 13.5 miles from the San Luis Rey River to Lake Wohlford near Escondido. It traverses portions of the La Jolla, Rincon and San Pasqual Indian Reservations, and other government and private lands. Other major Project works include Lake Wohlford Dam and Reservoir constructed in 1895 on private and government land, the Bear Valley powerhouse[4] constructed in 1915 on private land, and the Rincon powerhouse constructed in 1916 on the Rincon Reservation. The Pauma and Pala Indian Reservations are within the San Luis Rey River watershed, but are located several miles downstream from any Project works. (See App. 30 for a map of the Project)[5]

In 1971, Mutual applied, pursuant to §15(a),[6] App. 386, for a new fifty-year license to operate Project No. 176.[7] The Bands

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[3]The term "Commission" refers to both the Federal Power Commission, and its successor the Federal Energy Regulatory Commission. (See 42 U.S.C. §§7101-7295).

[4]The Bear Valley powerhouse was destroyed by a mudslide in March 1980 and is currently being reconstructed at a cost of approximately $1,300,000. (22 FERC ¶61,350; see also, 18 FERC ¶61,299 (expansion of Bear Valley powerhouse delayed pending a final decision on relicensing)). An additional application to add a third powerhouse to the Project is still pending.

[5]Project 176 occupies approximately 1,200 acres. Of this 87.4 acres (7.3%) is Indian Reservation land, 406.1 acres (33.8%) is other federal land, 662 acres (55.2%) is owned by Mutual, and 43.9 acres (3.6%) are other private lands over which Mutual has rights-of-way. (Opinion 36, App. 51) When Vista's Henshaw Dam and reservoir are included (see note 9, *infra*) the Indian Reservation lands will comprise less than 2% of Project 176.

[6]Unless otherwise noted, all section references are to the Federal Power Act (FPA), 16 U.S.C. §791a, *et seq*. For parallel citations to the United States Code, see the table of authorities, *infra*.

[7]Since the expiration of the original license in June, 1974, Mutual has operated the Project under annual licenses. (See §15(a), App. 386; see also *Lac Courte Oreilles Band v. Federal Power Comm'n* (1975 D.C. Cir.) 510 F.2d 198, 205 (Section 15(a) mandates the grant of annual licenses even absent Indian consent, or Interior approval))

and Interior subsequently intervened.

The Bands sought to have the Project licensed to them as a non-power project under §15(b), App. 387. Interior sought to impose conditions under §4(e) on any new license issued to Mutual, recommended federal takeover of the Project (§14, App. 384), or alternatively, supported the Bands' application for a non-power license.

On June 1, 1977, the Administrative Law Judge (ALJ) issued his Initial Decision. (See 6 FERC ¶63,008) The ALJ ruled that because the power production was so incidental to the Project's major purpose—irrigation—the Commission lacked jurisdiction to relicense it; but, if the Commission found jurisdiction, then a new fifty-year license should be issued jointly to Mutual, City[8] and Vista[9].

On February 26, 1979, the Commission issued Opinion No. 36 (6 FERC ¶61,189, App. 42), and ruled, *inter alia*, that: it had jurisdiction over Project 176; a new license should issue jointly to Mutual, City and Vista; annual charges for the use of Indian lands pursuant to §10(e), App. 382, should be substantially increased; and the new license should be subject to additional conditions, including the delivery of water to the Bands.

The Commission granted rehearing and on November 26, 1979, issued Opinion No. 36-A (9 FERC ¶61,241, App. 310), and ruled *inter alia*, that: Mutual's net investment was zero; if the Project were not relicensed to Mutual, it would not be entitled to severance damages; and a new licensee would not be obligated to assume any of Mutual's contracts. Opinion No. 36-A also modified the annual charges and clarified the requirement to supply water to the Indians. Issuance of the new license was stayed for two years pursuant to §14(b), App. 385, during which time Interior could attempt to persuade Congress to authorize

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[8]In 1975, City, which is in the process of acquiring Mutual, filed an application seeking to become a joint applicant with Mutual.

[9]Water is released from Vista's Henshaw Dam into the San Luis Rey River, diverted into the Escondido Canal and then transported through the Project works for delivery to the Escondido and Vista communities. The importance of Henshaw Dam to the Project convinced the ALJ to include it as part of the Project works and make Vista a joint licensee.

federal takeover.[10]

Pursuant to §313(b), all parties except the Commission petitioned for review of Opinions 36 and 36-A. The petitions were consolidated and argued on July 6, 1982, before a three-judge panel of the Ninth Circuit.

On November 2, 1982, the Ninth Circuit issued its decision. (*Escondido Mutual Water Co., v. Federal Energy Regulatory Commission* (1982 9th Cir.) 692 F.2d 1223, App. 1). The Court affirmed the Commission's jurisdiction; but, held that: in addition to securing a federal power license, MIRA §8 required petitioners to obtain rights-of-way for the Project from the Bands; §4(e) required the Commission to include in the new license, any conditions proposed by Interior without regard to their reasonableness; and, Indian "water rights" were a "reservation" within the meaning of §4(e).

All parties petitioned for rehearing, and on March 17, 1983, the Court issued its decision denying rehearing. (*Escondido Mutual Water Co., v. Federal Energy Regulatory Commission* (1983 9th Cir.) 701 F.2d 826, App. 31)

Circuit Judge Anderson dissented. He wrote that: the majority's interpretation of MIRA §8 "conflicts with the Federal Power Act's . . . pervasive scheme for obtaining rights-of-way over tribal land" (701 F.2d at 828, App. 34); the "legislative history [of MIRA] bears no indication that Congress intended §8 as the exclusive means of obtaining rights-of-way" (701 F.2d at 828, App. 34); the "[l]egislative history of the FPA is also at odds with our opinion" (701 F.2d at 829, App. 37); and, that "§§3(2), 4(e) and 10(e) of the FPA are express congressional authority for acquiring such property." (701 F.2d at 830, App. 39) He also

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[10]That stay expired without any Congressional action. On November 20, 1982, the Commission issued a new stay pending the completion of judicial review. (17 FERC ¶61,157.)

"would place the initial reasonableness decision [respecting Interior's conditions] on FERC" and concluded that "FERC properly interpreted and applied §4(e) and that all of its findings in that regard are supported by substantial evidence." (701 F.2d at 831, App. 41)

These quotations succinctly state the reasons for granting this Petition.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT OPINION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND RAISES IMPORTANT ISSUES OF LAW WHICH SHOULD BE SETTLED BY THIS COURT

This is one of the first contested cases involving the relicensing of a federal power project. The manner in which it is resolved will profoundly impact many major projects due for relicensing.[11] The opinion below threatens the authority of the Commission to relicense federal power projects located on or near federal reservation lands.[12]

I

PERMITTING INDIAN BANDS TO VETO A COMMISSION RELICENSING DECISION IS CONTRARY TO EXPRESS CONGRESSIONAL INTENT, INCONSISTENT WITH LONG-STANDING ADMINISTRATIVE INTERPRETATION AND CONFLICTS WITH OTHER DECISIONS OF THIS COURT

The holding that, in addition to an FPA license, Petitioners must obtain the consent of the Indian Bands for rights-of-way across the Mission Indian Reservations, pursuant to Act of January 12, 1891, 26 Stat. 712, Mission Indian Relief Act (MIRA),[13]

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[11] According to information from the Commission Staff, 136 major license projects will be due for relicensing in the next decade.

[12] According to Commission's Counsel at the July 6, 1982 oral argument, 606 federal projects utilize federal lands and reservations, and 35 utilize Indian reservations.

[13] Section 8 of MIRA provides in part:

> "Subsequent to the issuance of any tribal patent, . . . any citizen . . . *may* contract with the tribe, . . . for the right to construct . . . appliances for the conveyance of water over . . . such lands, which contract *shall* not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose." (Emphasis added, full text in App. 379)

It is of interest that both the permissive "may" and mandatory "shall" were used. If Congress had meant that "may contract" should mean "shall contract", it would have so written. Moreover, if this were an oversight, surely someone on behalf of the Mission Indians would have brought it to the attention of one of the 45 Congresses which have convened since its adoption.

gives them a *veto* over Project 176.

The Court fairly analyzes section 8 "at the time of its passage" (692 F.2d at 1233, App. 20); however, its conclusion that "[s]ection 8 of MIRA is . . . a carefully conditioned and circumscribed delegation of that [*i.e.* Congressional] power to Interior, and to the Band themselves" (692 F.2d at 1233 n.6, App. 20) cannot withstand scrutiny.

This conclusion makes time stand still between 1891 and 1983. It ignores all Congressional purposes for water power development as expressed in the FPA (see, Pinchot, *The Long Struggle for Effective Federal Water Power Legislation* (1945) 14 Geo. Wash. L. Rev. 9) and renders vacuous the affirmance of Commission jurisdiction over Project 176.

Even if MIRA and the FPA were construed as contemporaneous expressions of Congressional intent, the differences are manifest. MIRA does not deal with water power development (*i.e.*, dams, reservoirs, powerhouses, electric lines, etc.). Rather, it is specifically limited to ". . . a flume, ditch, canal, pipe or other appliances for conveyance of water over . . . such lands . . ." (MIRA §8, App. 380)

Neither does MIRA deal with the rights of the United States or its licensees to use Indian lands. In fact, these reservation patents specifically reserved "a right-of-way thereon for ditches or canals constructed by the authority of the United States." Rather, section 8 of MIRA applied to "any citizen . . . [who] may contract. . . ." Project 176 is a power project which must be licensed under §23(b). (*Federal Power Comm'n v. State of Oregon* (1955) 349 U.S. 435, 442-445)

A. The Federal Power Act Applies to Indian Lands

Section 4(e) empowers the Commission "to issue licenses . . . upon any part of the public lands and reservations of the United States . . . ." (App. 381), and section 3(2) defines "reservation" to include "tribal lands embraced within Indian reservations." (App. 380)

In *Federal Power Commission v. Tuscarora Indian Nation* (1960) 362 U.S. 99, the Court emphasized the comprehensive nature of the FPA, and wrote:

"The Federal Power Act constitutes a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission and utilization of electric power in the streams or other bodies of water over which Congress has jurisdiction under its commerce powers, and upon the public lands and reservations of the United States under its property powers. See §4(e). *It neither overlooks nor excludes Indians or lands owned or occupied by them. Instead, as has been shown, the Act specifically defines and treats with lands occupied by Indians — tribal lands embraced within Indian reservations.* See §§3(2) and 10(e). *The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians.*" (362 U.S. at 118) (emphasis added)

B. Congress Expressly Rejected an Indian Veto, and Protected Indian Lands in Other Ways

During Senate debate on the FPA, the Senate amended section 4(e) so that; ". . . no license shall be authorized except by and with the consent of the council of the tribe." (59 Cong. Rec. 1534 (1920))

This amendment was rejected in conference and stricken from the bill. The conference report states:

> "The Senate conferees . . . saw no reason why water power use should be singled out from all other uses of Indian reservation land for special action of the council of the tribe." (H. R. Rep. No. 910, 66th Congress, 2d Sess. at 8.)

The arguments made during the debate demonstrate that Congress expressly dealt with the issue. For example, Senator Myers stated:

> "If this amendment becomes a law, it would be in the power of a tribe of Indians, arbitrarily and without any reason whatever, to block a project for water-power development. . . . They would have an absolute power of veto." (59 Cong. Rec. at 1565)

Although Justice Anderson grapsed the importance of this history (701 F.2d at 829, App. 37), the majority totally ignored it.[14] Congress protected the Indians in other ways.

Section 4(e) requires a finding "that the license will not interfere with the purpose for which such reservation was created or acquired,"[15] and ". . . be subject to such conditions as the Secretary . . . [of Interior] shall deem necessary for the adequate protection and utilization of such reservation."[16] (App. 381)

In addition, §10(e) requires licensees to pay a "reasonable annual charge" for the use of Indian lands, which charges are subject to periodic readjustment.[17] (App. 382, 383)

Section 10(i) which permits the Commission to waive most conditions for a minor project like No. 176, does "not apply to annual charges for the use of Indian lands." (App. 384)

Finally, section 29 provides: "That all acts or parts of acts inconsistent with this Act are hereby repealed." (See App. 388.) The Court of Appeals' decision repeals *sub silento* section 29, and returns this area of the law to the chaos that existed prior to the FPA, with each project having to fulfill separate require-

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[14]In 1948 Congress reemphasized this decision when in passing the General Indian Right-of-Way Statute, 25 U.S.C. §§323-328 it specifically provided that the Act "shall not in any manner amend or repeal the provisions of the [FPA]." (25 U.S.C. §326)

[15]A Commission finding of "non-interference" is essential before issuance of an original license. (*See Federal Power Commission v. Tuscarora Indian Nation, supra,* 362 U.S. at 110-11.) Here, although not required by §15(a), the Commission also made such a finding in connection with its relicensing decision. (Opinion 36, App. 174, 176.)

[16]The Commission has always given great weight to the conditions "recommended" by Interior. (See *Pigeon River Lumber Co.* (1935) 1 F.P.C. 206, 209.) In relicensing Project 176 the Commission adopted all of Interior's conditions that were consistent with the Commission's overall obligations under §10(a). (Opinion 36, App. 143-55)

[17]The Commission has increased annual charges as conditions warrant. (See, *e.g., Montana Power Company v. Federal Power Comm'n* (1972 D.C. Cir.) 459 F.2d 863, *cert. denied* (1972) 408 U.S. 930.) Likewise in relicensing Project 176, the Commission has been generous. (See generally Opinion 36, App. 190-216, 232-45, 261-66; Opinion 36-A, App. 339-45)

ments and each potential licensee having to go to Congress to obtain its own private Act to authorize its project.[18]

C. The Commission Consistently Has Interpreted the Act as Not Permitting an Indian Veto[19]

From the beginning, the Commission has interpreted §4(e) as empowering it to grant rights-of-way across Indian reservations for a federal power project even if the Indians do not consent. (See *Pigeon River Lumber Co.* (1935) 1 F.P.C. 206 (lack of Indian consent does not prevent the Commission from issuing a preliminary permit for a project using tribal Indian lands)) This consistent and reasonable interpretation by the Commission of its own Act is entitled to great deference. (See, *e.g.*, *American Paper Institute, Inc. v. American Electric Power Service Corp.* (1983) ___ U.S. ___, 51 U.S.L.W. 4547, 4552)

D. An Indian Veto Is Inconsistent With Other Decisions of This Court Which Have Denied States a Veto

By giving the Bands power to withhold their consent and thus veto a decision by the Commission to relicense a federal power project, the Ninth Circuit ignored the pervasive scheme of Congress for the nationwide development of power. Its holding conflicts with this Court's decision in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission* (1946) 328 U.S. 152, which interpreted Congress' intent in enacting the FPA. The Court there held that a State did not have a similar veto power over the licensing of a federal power project.

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[18]Such private acts could, depending upon the "political muscle" of their sponsor, provide much *less* protection for the Indians.

[19]Although Congress amended §10(e) in 1935 to provide that certain tribes organized under the Indian Reorganization Act (25 U.S.C. §476) must approve annual charges in an original license, the Commission and Courts have denied those tribes a veto over any readjustment of those annual charges. (*See, e.g., Montana Paper Company v. Federal Power Comm'n* (1970 D.C. Cir.) 445 F.2d 739, 756, *cert. denied* (1971) 400 U.S. 1013 (Once having approved the annual charges in the *original license*, if dissatisfied with the readjustment decision "the only further recourse of . . . the tribe is the right of appeal."))

In *First Iowa*, the State intervened in Commission proceedings to license a major hydro-electric power project on the Cedar River in Iowa. The State argued that in addition to complying with the FPA, the license applicant had to comply with a State statute which required a permit to construct a dam on State waters. Although the Commission believed that the FPA superseded any State requirements, it dismissed the applicant's petition so the issue could be squarely presented to the Courts.

The District of Columbia Circuit affirmed, and the United States Supreme Court granted certiorari and reversed. Clearly recognizing the intent of Congress to vest in the Commission the responsibility over water-power development, it stated:

> "To require the petitioner to secure a state permit . . . as a condition precedent to securing a federal license . . . would vest in the [State] a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the federal Act. It would subordinate to the control of the state the 'comprehensive planning' which the Act provides shall depend upon the judgment of the Federal Power Commission." (328 U.S. at 164)

The Ninth Circuit majority disagreed with the Commission "that section 8 of MIRA and the FPA conflict", and concluded the licensees for Project 176 must "both obtain a license from the Commission, and . . . the necessary right-of-way by the method provided in section 8 of MIRA". (692 F.2d at 1233, App. 21). As for such duplication of control between States and the Commission, the Supreme Court in *First Iowa*, wrote:

> "A dual final authority with a duplicate system of state permits and federal licenses required for each project, would be *unworkable*." (328 U.S. at 168) (emphasis added)

The Indian veto created by the Ninth Circuit in this case will frustrate the purpose of Congress in exactly the same fashion as the State veto in *First Iowa*. In *First Iowa* the Court explained that the Congressional purpose was:

> ". . . to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the nation insofar as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of . . . other

federal laws previously enacted." (*Id.* at 180)

In *Federal Power Commission v. State of Oregon* (1955) 349 U.S. 435, the Commission, over the objection of the State of Oregon, granted a license for a power project located on a federal reservation in that State. The Court again rejected dual control over federal power projects, stating:

> "To allow Oregon to veto such use, by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the First Iowa decision. [citation] No such duplication of authority is called for by the Act." (*Id.* at 445)

Contrary to *First Iowa* and *State of Oregon*, the Ninth Circuit opinion gives a small California Indian band a veto which even the State of California does not have.

E. An Indian Veto Is Inconsistent With Other Decisions of This Court Which Have Authorized the United States and Its Licensees to Use Indian Lands Without Obtaining Indian Consent

From the beginning, Congress has possesed plenary authority to grant rights-of-way through Indian lands. (See, *e.g.*, *Cherokee Nation v. Southern Kansas Railway Co.* (1890) 135 U.S. 641 (Congress authorized a railroad project through an Indian reservation even though it violated the treaty establishing the reservation)). Congress has undoubted authority to grant rights-of-way without specifically mentioning the Indian reservation in the Authorization Act. (See, *e.g.*, *Spalding v. Chandler* (1896) 160 U.S. 394 (sustaining the power of the Government to convey a strip of land through a tract owned by an Indian tribe to one Chandler for the use of the State of Michigan in construction of a canal, even though the conveyance was in derogation of a treaty with the Indian tribe)).

In *Tuscarora, supra*, 362 U.S. 99, the Court also authorized the use of Indian fee lands for federal power project purposes, despite lack of Indian consent. The Court held that the Nonintercourse Act, 25 U.S.C. § 177, was not applicable to the United States or its licensee under the FPA (362 U.S. at 119-122).[20]

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[20]MIRA section 8 does not apply to the United States or its licensees, but only to private parties. (See discussion at 8, *supra*)

F. An Indian Veto Imperils All Projects Located on Indian Lands

The Commission has licensed at least 35 projects that use Indian lands. (See note 12, *supra*) Each of these project licenses will have to be reexamined to ascertain if Indian consent is required under some pre-1920 statute, treaty or agreement.[21]

Like the scheme condemned by the Supreme Court in *First Iowa, supra*, the Ninth Circuit has created a "dual final authority" which is "unworkable" and has resorted to the "piecemeal, restrictive, negative approach" the FPA was to replace. To allow the Mission Indians a veto over Project 176 "would result in the very duplication of regulatory control" precluded by *State of Oregon*. The opinion also ignores the Supreme Court's holding in *Tuscarora* that within the FPA's "comprehensive plan, Congress intended to include lands owned or occupied by . . . Indians." Finally, it fails to give appropriate deference to the Commission's interpretation. (*Chemehuevi Tribe of Indians v. Federal Power Comm'n* (1975) 420 U.S. 395, 410)

II

PERMITTING INTERIOR TO VETO A COMMISSION RELICENSING DECISION IS CONTRARY TO CONGRESSIONAL INTENT, INCONSISTENT WITH LONG-STANDING ADMINISTRATIVE INTERPRETATION, CONFLICTS WITH OTHER DECISIONS OF THIS COURT AND JEOPARDIZES ALL PROJECTS ON FEDERAL RESERVATION LAND

Section 4(e) provides that an initial license "shall be subject to and contain such conditions as the Secretary of the Department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations." (App. 383) The Ninth Circuit ruled that this section requires the Commission to include, without modification, In-

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[21]Other acts requiring Indian consent are scattered throughout the uncodified statutes. (See, *e.g.*, Act of February 10, 1891, 26 Stat. 745 (Use of Umatilla Reservation for canal purposes); Act of May 18, 1916, 39 Stat. 123, 157-58 (Lac Courte Oreilles tribe consent needed for use for storage reservoir purposes)).

terior's conditions in its relicensing decision. (692 F.2d at 1234-35, App. 25).

This ruling usurps the Commission's fact finding role by depriving it of the ability to rule on the "reasonableness" of Interior's conditions. Despite the Ninth Circuit's disclaimer[22] (692 F.2d at 1235, App. 24-25), it gives Interior a veto over the relicensing authority of the Commission.

A. The FPA's Legislative History Supports the Independence of the Commission

In 1918, the Secretaries of War, Interior and Agriculture drafted a predecessor bill to the FPA. (H.R. 8716, 65th Cong. 2d Sess. (1918)) In a letter transmitting the bill and certain amendments to the special House committee on water power, the three Secretaries stated:

> "*The various establishments of the Federal Government which have had to do with the administration of water power should be coordinated through a single agency, and as far was practicable all agencies, federal, state, private, should be brought into cooperation.* It is urgently recommended that a federal power commission be established as provided in the proposed bill and be given ample authority to undertake this work of preliminary investigations." (See *Chemehuevi Tribe of Indians v. Federal Power Comm'n* (1973 D.C. Cir.) 489 F.2d 1027, 1220-21) (emphasis added)

Thus from its inception the Commission was intended to be the single agency responsible for administering national water power development.

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[22]The Court's reasoning on the issue is unclear. After first ruling that Interior's conditions would be subject to review under the Administrative Procedure Act, 5 U.S.C. §§701-706 (1976), it later modified its opinion to delete reference to that Act. (701 F.2d at 827, App. 32-33)

While this leaves judicial review pursuant to § 313(b), it is unclear how this review would be accomplished. Since the Commission would be required to include the conditions without having to "find the facts," the "substantial evidence" provisions of 313(b) would be inapplicable. Would the parties then have the right to present direct evidence before the Court of Appeals? Would the matter be remanded to the Commission to take evidence that it was prohibited from taking into account in its licensing decision? The more one reflects the more unworkable the Court of Appeals solution becomes.

Although the Commission initially consisted of three Secretaries (War, Interior and Agriculture), Congress intended that none should have a veto. This intent became manifest in 1930 when the Commission was organized as a five-person body, independent from the Secretaries, with its own staff (Act of June 23, 1930, 46 Stat. 797). This is the Commission's current structure. (See §1)

B. The Commission Consistently Has Interpreted the Act as Not Providing Interior With a Veto[23]

The Commission consistently has interpreted § 4(e) to require only those conditions which the Commission deems reasonable and in the public interest. (See *Pigeon River Lumber Co.* (1935) 1 F.P.C. 206, 209) (Commission, however, will "give great weight to judgment and recommendation of the custodian of the rights and welfare of the Indians"); see also, *Pacific Gas and Electric Co.* (1975) 53 F.P.C. 523, 526. (Commission refused to include conditions proposed by Secretary of Agriculture in relicensing decision noting that "while the Commission gives great weight to the judgment and recommendation of the Department . . ., the Commission nevertheless must act on the basis of the record as a whole and must exercise its judgment to insure that the project if licensed meets the requirement of Section 10(a) of the Act.")

This consistent and reasonable interpretation by the Commission of its own Act is entitled to great deference. (*American Paper Inst., Inc. v. American Electric Power Service Corp., supra*, 51 U.S.L.W. at 4552)

C. An Interior Veto Is Inconsistent With Other Decisions of This Court

The reasoning of *First Iowa*, *State of Oregon*, and *Tuscarora*, denying vetoes to States and Indians applies *a fortiori* to a veto by Interior.

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[23]The Commission has also denied Interior a veto over the fixing of annual charges for the use of Indian lands under § 10(e). (See, *e.g., Montana Power Co. v. Federal Power Comm'n* (1971 D.C. Cir.) 459 F.2d 863, 874, *cert. denied* (1972) 408 U.S. 930 ("Secretary can refuse to approve the rate fixed by the Commission only by seeking court review of its determination."))

Such a veto is inconsistent with *Federal Power Commission v. Idaho Power Co.* (1952) 344 U.S. 17, 21, which held that a determination of whether the objectives of § 10(a) can be achieved in the absence of certain conditions is "an administrative not a judicial decision." The Ninth Circuit, however, relegates the Commission to a rubber stamp and arrogates fact-finding to itself.

D. A Secretarial Veto Is Inappropriate in a Relicensing Context

The FPA establishes two separate licensing schemes: (1) a procedure for initially licensing a new project (§4(e)), and (2) a procedure for issuing a new license after an original or prior license expires. (§15) (See *Pacific Gas & Electric Co., supra*, 53 F.P.C. at 526 ("New licenses are issued under §15 rather than §4(e).""))

The reason Congress did not require section 15(a) licenses to meet section 4(e) requirements is obvious when one considers the practical distinctions between the two situations. When an applicant applies for an original license, there has not been a substantial financial investment and no consumer reliance on the project has developed. At that stage, if the Commission seeks to impose onerous conditions, the applicant can reject them and if the proposal interferes with a particular reservation, the project will not move forward. The situation on relicensing is quite different. In such a case, there has already been a finding that the project will not interfere with the reservation in question; the applicant has accepted the proposed conditions and built the project; the public has become dependent on its benefits; and the only real question is who should operate the project, the existing licensee, the United States or a competing applicant.

Since this is a relicensing case under §15(a) a Secretarial veto is inapplicable.[24]

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[24]The Petitioners respectfully disagree with the Commission which held that §4(e) was applicable because the proceeding was "partly an initial licensing of the Henshaw facilities." (Opinion 36, App. 136) This is particularly true since no additional public lands or reservations are involved. All of the Henshaw lands are owned by Vista, except minor acreage under permit from Forestry.

E. A Secretarial Veto Is Particularly Inappropriate When Interior's Trust Responsibility Is Involved

During Commission proceedings the Bands and Interior argued that Interior had the absolute right to impose conditions and that because Interior was acting *solely* as trustee for the Indians, it did not have to propose reasonable conditions. (21 T.R. 4275-76; 29 T.R. 6132-33; 29 T.R. 6181) Interior's stance prompted the ALJ to ask if it really wasn't "a question of reasonableness, of being fair to all sides." (29 T.R. 6156) Interior's Associate Solicitor replied:

> "[Interior's] trust responsibility to Indians . . . may preclude the kind of fairness, the kind of balancing of interests that normally goes on in the political process." (29 T.R. 6157)

Interior made no pretense of reasonableness, prompting the ALJ to state: "It is manifest the conditions were designed not to improve the project but to destroy it." (6 FERC ¶63,008, Initial Decision at 52) The ALJ concluded that "If [this approach] were to become the custom in other cases, the hydro power potentialities of the nation's many reservations [could not] contribute to the national need, nor [could] their avails be realized for the Indians' benefit." (*Ibid.*)

The Commission did not ignore Interior's proposed conditions; it gave substantial deference to them. (See note 16, *supra*) However, it did not consider itself bound to adopt Interior's conditions "exactly as propounded." (Opinion 36, App. 147)

Yet, despite their transparent unreasonableness, the Ninth Circuit now requires the Commission to include these conditions. Its decision threatens the viability of all projects which use Indian land.[25] For example, in *Tuscarora, supra*, the licensee was permitted to flood Indian lands. When that license expires Interior could require this Indian land to be "unflooded," and thus destroy the project.

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[25]Because §4(e) gives the same power to each "Secretary of the Department under whose supervision such reservation falls," such a veto power could also effect the viability of all projects located on federal reservation land.

The Ninth Circuit's holding also allows Interior to usurp the Commission's decision-making role under §10(a). Only applicants favored by Interior will be licensed. The Ninth Circuit's holding will undermine the most important role Congress gave the Commission—determining which project will best serve the *public* interest. (See §10(a), App. 382)

III

THE NINTH CIRCUIT'S HOLDING THAT "WATER RIGHTS" ARE A "RESERVATION" FOR SECTION 4(e) PURPOSES IS A STRAINED AND UNNECESSARY INTERPRETATION THAT JEOPARDIZES ALL FEDERAL POWER PROJECTS

The Ninth Circuit held that Interior's conditions also must be imposed with respect to the Indian reservations which "may be affected by the project." (692 F.2d at 1235, App. 25) The Court reached this remarkable conclusion by determining that Indian "water rights" are a "reservation" for the purposes of the FPA. Consequently a project that is 500 miles away from a reservation is "within" that reservation if it affects the reservation's water rights.

This interpretation of "reservation" is both strained and unnecessary. It is strained because it conflicts with both the clear language of the statute and the Commission's long-standing interpretation of it. It is unnecessary because Indian water rights are fully protected by other means.

A. The Ninth Circuit's Interpretation Is Inconsistent With Both the Statutory Language and the Commission's Long-standing Interpretation of It

Section 4(e) authorizes the construction of power projects "*upon* . . . reservations of the United States" and states that "licenses shall be issued *within* any reservation." (App. 381) (emphasis added) Section 3(2) defines "reservations" to include "tribal lands embraced *within* Indian reservations." (App. 380) (emphasis added)

The Court conceded "that the word 'within' tends to paint a geographical picture in the mind of the reader." (692 F.2d at 1236, App. 26) Certainly if Congress had intended the result that the Court strained to reach, it simply would have added the words

"or affecting" following the word "within."

The Court's definition of "reservation" also conflicts with *Tuscarora, supra*. In that case the Court stated that Congress:

> " '[F]or purposes of this Act' " (§3(2)), intended to and did *confine* "reservations," including "tribal lands embraced within Indian reservations" (§3(2)), to those located on *lands* "owned by the United States" (§3(2)), or in which it owns a proprietary interest." (362 U.S. at 114) (emphasis added)

Clearly the lands in question would have been "affected" by the Project, nevertheless they were not within the definition of "reservation" because they were owned "in fee" and not by the United States.

Here the situation is similar. There is no indication that Congress intended water rights to be a "reservation" within the meaning of the FPA. It is apparent that the "lands" and "interests in land" referred to were geographical in nature and not intended to include usufructuary water rights.

Recognizing the awkwardness of its intepretation, the Court purported to find "a possible ambiguity" in the statute that should be "resolved" in favor of the Indians. (692 F.2d at 1236, App. 27) Its interpretation, however, extends the FPA far beyond Congressional intent (See, *e.g., NAACP v. FPC* (1976) 425 U.S. 662), and ignores the Commission's long-standing interpretation and application of the Act. (See, *e.g., Chemehuevi Tribe of Indians v. FPC* (1975) 420 U.S. 395, 410) Its interpretation also ignores the rule that statutes are not construed in favor of the Indians where they are intended to achieve other purposes and do not require Indian consent. (See *United States v. First National Bank* (1914) 234 U.S. 245, 259)

B. It Was Unnecessary for the Ninth Circuit to Distort the Meaning of the FPA in Order to Protect Indian Water Rights

The Court expressed concern that a project could turn "a potentially useful reservation into a barren waste without even crossing it in a geographical sense . . . [and would] not attribute to Congress . . . [such a] perverse and illogical intention. . . ." (692 F.2d at 1236, App. 28) This concern, however, is wholly

unjustified. For a project to have such dire consequences, the Commission would have to ignore the project's harmful effects[26] and the Courts would have to refuse to protect Indian water rights.[27] There is nothing in the history of this or any other federal water power project that would warrant such speculation.

The Commission has no power to adjudicate water rights (see §27, App. 387-88; see also *First Iowa, supra*, 328 U.S. at 175 (State water right laws are not superseded by the Federal Power Act)); nor is the Commission an appropriate forum for the resolution of water rights conflicts.

Although the Commission must require "satisfactory evidence" from an applicant that it has the right "to the appropriation, diversion, and use of water for power purposes. . . ." (§9(b)), protection of the right to "an allotment of water necessary to make the reservation livable," is a judicial function. (*State of Arizona v. State of California* (1983) ___ U.S. ___, 51 U.S.L.W. 4325, 4328 (quoting from *State of Arizona v. State of California* (1963) 373 U.S. 546, 599-600); see *Winters v. United States* (1908) 207 U.S. 564; *Cappaert v. United States* (1976) 426 U.S. 128, 141.)

See also the McCarran Amendment, 43 U.S.C. §666, which permits joinder of the United States as a party to general stream adjudications; *Colorado River Water Conserv. Dist. v. United States* (1976) 424 U.S. 800, 819 (federal policy disfavors piecemeal adjudication of water rights)

C. The Ninth Circuit's Interpretation Jeopardizes All Federal Power Projects

The Ninth Circuit's sweeping definition of the word "reservation" exacerbates the problems created by its other holdings by making most federal hydro-electric projects subject to an In-

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[26]The Commission did not ignore the Pala, Pauma and Yuma Reservations. It required the licensees to fulfill all valid contracts to supply electric power and water to them. (Opinion 36, App. 219-21). The Commission also indicated that it might impose additional requirements consistent with the final disposition of the district court litigation. (Opinion 36-A, App. 334) See also Opinion 36, App. 190.

[27]The water rights of all the parties are being adjudicated in the federal courts. (*Rincon Band et al. v. Escondido Mutual Water Co. et al.*, U.S. Dist. Ct., S.D. Cal. Nos. 69-217-S, 72-271-S, 72-276-S).

dian or Secretarial veto. As noted above, the Winters doctrine gives federal reservations reserved water rights. Because these water rights "may be affected" by a project located hundreds of miles away, almost every hydro-electric power project in the West could be "within a reservation" as the Ninth Circuit has defined the term. Therefore, each project could be subject to the same fatal requisites imposed by the Ninth Circuit. They either could be destroyed by the forced imposition of unworkable conditions by Interior or lie useless for lack of Indian consent. Clearly, the Ninth Circuit has in one decision frustrated the comprehensive Congressional purpose expressed in the FPA.

Conclusion

Petitioners urge that the opinion below conflicts with decisions of this Court, misinterprets legislative history, ignores consistent Commission interpretation of the FPA, and presents important issues which are ripe for disposition by this Court.

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Respectfully submitted,

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